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IN THE

Supreme Court of the United States

October Term, 1970.

No. 437.

WILLIAM W. SELLERS, THE SELLERS COMPANY, INC. and SELLERS SERVICE, INC.,

Petitioners,

v.

TIME, INC.,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI.

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TIME, INC.,

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BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI.

OPINIONS BELOW.

Petitioners seek a writ of certiorari to the United States Court of Appeals for the Third Circuit which on March 20, 1970 affirmed the judgment of the United States District Court for the Eastern District of Pennsylvania dismissing the complaint in a libel action based on an article published in Time magazine. The Third Circuit,

agreeing with the District Court, held that the Time article was not capable of a libelous meaning under the Pennsylvania common law of libel.' The Third Circuit's opinion (Appendix 10 of Petition) is reported at 423 F. 2d 887.

The District Court additionally granted respondent's motion for summary judgment on the grounds that the Time article was privileged as a fair report of judicial proceedings under the Pennsylvania common law of libel and was also constitutionally privileged as a matter of law under the principles of *New York Times Co. v. Sullivan*, 376 U. S. 254 (1964). The Court of Appeals did not reach these privilege questions.

The District Court's opinion (Appendix 1 of Petition) is reported at 299 F. Supp. 582.

QUESTIONS PRESENTED.

1. Whether the Third Circuit correctly held that the Time article was not reasonably capable of a defamatory meaning, in accordance with established principles of the Pennsylvania common law of libel.

2. If not, whether the District Court correctly held that the Time article was privileged as a fair report of judicial proceedings under the Pennsylvania common law of libel, and was constitutionally privileged under *New York Times Co. v. Sullivan*, 376 U. S. 254 (1964) and related decisions of this Court.

STATEMENT OF THE CASE.

This is a libel action[1] based on an article entitled "Duffer's Dilemma" which appeared in the Law section of the May 6, 1966 issue of Time magazine. The article reported on a personal injury action instituted in the District Court for the Eastern District of Pennsylvania against William Sellers and the Sellers Companies by a business acquaintance, James Walsh, whom Sellers had blinded in a freak golfing accident. The development in the case that prompted Time's report was District Judge Luongo's denial of Sellers' motion for summary judgment in which plaintiffs asserted that Walsh had assumed the risk of Sellers' "impossible" shot which had been hit laterally and to the rear of the tee.

The decision that the defense of assumption of risk was inapplicable because Walsh was hit by a wild shot while in a place of supposedly perfect safety was reported and summarized in Sections 1 and 2 of the April 19, 1966 issue of United States Law Week, 34 U. S. L. W. 1160, 2563, where it was seen by the editor of the Law section of Time magazine (App. 123-24).[2] Time's Philadelphia correspond-

1. The petition erroneously describes the action as being for libel and invasion of privacy (e.g., p. 3). The complaint sounds solely in libel; it contains no language which even remotely suggests a privacy cause of action. Petitioners have proceeded exclusively on a libel theory, both opinions below describing and treating the action as for libel only. Individual petitioner Sellers first contended "that his cause of action may also be sustained under the Pennsylvania common law principle of invasion of privacy" in a petition for rehearing by the Third Circuit, filed April 3, 1970. The petition for rehearing complained that the Court of Appeals "completely overlooked and failed even to discuss the invasion of privacy issue as it it did not exist," based on an oblique reference to common law invasion of privacy in a footnote in petitioners' reply brief.

2. References to the Appendix containing the designated portions of the record on appeal in the Third Circuit are cited herein as "App.".

ent reviewed the District Court file in *Walsh v. Sellers*, and forwarded a copy of Judge Luongo's opinion to New York with a memorandum summarizing the depositions of Walsh and Sellers in that action (App. 18). The Time article was based on Judge Luongo's opinion and the sworn deposition testimony of Sellers, taken in the Walsh action. The article was prepared in draft (App. 46), and then edited, reviewed by Time's Managing Editor, checked for accuracy by a researcher and reviewed by a Professor of Law at Columbia University prior to publication (App. 13).

Sellers testified in his deposition in *Walsh v. Sellers* that on the day of the accident he was at a golf dinner and outing of the Oil Trade Association of Philadelphia, and was there on the business of Sellers Company to solicit sales and make arrangements for the purchase or sale of products used by his company. His admitted intent in playing golf that day was to further the profits of Sellers Company. He also stated that Walsh was "in a position to help me as well in recommending our products" (App. 2-3). He further testified that he did not have a playing membership at any club, and that he played golf "maybe two, maybe three, five, maybe half a dozen times a year" at the various outings he went to (App. 5). As to his golf prowess, Sellers stated that he would generally expect "to go out and shoot 100-105, something like that" (*Ibid.*). With respect to the accident, Sellers admitted he was unable to remember exactly what happened, but thought that in swinging, the toe of his club connected with the ball and instead of going forward, it had a spin on it which made it curve backwards and to the side. He did not deny that the ball struck Walsh in the eye (App. 6-7).

Time's article, which reported a judicial decision that held the defense of assumption of risk inapplicable in a personal injury action arising out of a wild golf drive

described by the Court as an "impossible" shot, clearly dealt with a matter of public interest. The article, which is short, is set out in full in the opinions below. Although written in a lively prose style, which petitioners characterized as "flippant" and "smart alecky", it is obviously not defamatory.

Nonetheless petitioners filed a libel action on May 26, 1966 claiming that the article was false and defamatory. Sellers contended the article libeled him because (1) it described him as a "duffer" and said that "Sellers' game was running true to form" on the day Walsh was struck with the ball; (2) it stated that he "plays golf for business rather than pleasure" and "was working while golfing"; and (3) it stated that "At the third tee, his mind on a potential deal, Sellers hit the ball so awkwardly that it flew to the rear and struck one of his partners, James Walsh . . . As a result, Walsh was blinded in his left eye."

The libelous meaning Sellers ascribed to these statements was that they portrayed him as an overly materialistic or crass man, for whom business success overrides all concern for others, as well as a stupid, awkward and incompetent person.

In support of their complaint petitioners undertook extensive pretrial discovery, including (1) receiving answers to two sets of interrogatories which set forth in detail the editorial process of respondent; (2) examining the entire editorial reference file of respondent relating to the article; and (3) deposing at length each of the five individuals who participated in the preparation of the article.

On August 2, 1968 Time filed a motion to dismiss the complaint on the ground the article was not capable of a defamatory meaning as a matter of law, and for summary judgment on the grounds the article was constitutionally privileged under *New York Times* and privileged as a fair

report of judicial proceedings under the Pennsylvania common law of libel. The four members of Time magazine's New York editorial staff who participated in the preparation of the article confirmed their belief in the truth of the article, both in the depositions taken by petitioners and in affidavits filed in support of respondent's motion. Petitioners submitted no opposing affidavits.

On May 12, 1969, after completion of all relevant discovery, District Judge Kraft granted respondent's motion. He based his decision on three grounds: First, that the article was privileged under the common law of Pennsylvania as a fair report of judicial proceedings. Second, that the article was constitutionally privileged because it reported on a judicial decision of public interest and petitioners failed to offer evidence of any genuine issue of "actual malice". In the view of Judge Kraft, "The supporting affidavits attached to the motion together with the depositions and answers to interrogatories, manifestly demonstrate the complete lack of any knowledge of the falsity of the article or reckless disregard of the truth on the part of Time's employees." 299 F. Supp. at 586. Third, that the article was not capable of the defamatory meanings ascribed to it by petitioners.

Additionally, Judge Kraft found that the portions of the article complained of by petitioners, as set forth above, were "substantially accurate." 299 F. Supp. at 586. This finding is material with respect to petitioner William Sellers' new theory, not raised below, that the article invaded his common law right of privacy.

On March 20, 1970 the Court of Appeals for the Third Circuit affirmed the District Court's judgment dismissing the complaint, on the ground that the article, fairly and reasonably construed, was not capable of the libelous meanings ascribed to it by petitioners. Accordingly, the Court

of Appeals found it unnecessary to consider the privilege issues.

On April 24, 1970 the Third Circuit denied Sellers' petition for a rehearing.

ARGUMENT.

A. The Court of Appeals Decision Correctly Held That the Article Was Not Reasonably Capable of a Defamatory Meaning Under Pennsylvania Law.

In holding that the Time article was not capable of the defamatory meanings attributed to it by petitioners, the Third Circuit correctly applied established principles of the Pennsylvania common law of libel. Moreover, the Court of Appeals was correct in concluding that the District Court also so held, as a reading of Judge Kraft's opinion makes plain. But even if the Third Circuit did misread Judge Kraft on the issue of the article's capacity for defamatory meaning, it properly disposed of this action on a common law ground without reaching and deciding the constitutional privilege issue.

Accordingly, there is nothing for this Court to review. The Third Circuit has properly decided a question of state law, applying principles established and followed in a long line of Pennsylvania state court libel cases and, indeed, followed in most if not all other American jurisdictions. There is nothing new or novel in the Third Circuit's decision. It involves no issue of importance to anyone except the party litigants.

(1) The Third Circuit Tested the Article's Capacity for Defamatory Meaning in Accordance With Pennsylvania Law.

Petitioners concede, as they must, that the question of whether the article is capable of a defamatory meaning—that is, whether it can fairly and reasonably be construed to have the libelous meanings ascribed to it by petitioners—is a matter of law for the court under Pennsylvania law (P.

10).[3] *Sarkees v. Warner-West Corp.*, 349 Pa. 365, 368, 37 A. 2d 544, 546 (1944); *Bagash v. Elkins*, 405 Pa. 437, 440, 176 A. 2d 677, 678 (1962); *Clark v. Allen*, 415 Pa. 484, 487, 204 A. 2d 42, 43 (1964); *Kerwick v. Dardanell Press*, 428 Pa. 288, 294, 236 A. 2d 191, 194 (1967); *Restatement of Torts* § 614 (1938). Petitioners also concede that the article's capacity for defamatory meaning is to be tested against the effect it is fairly calculated to produce, the impression it would naturally engender, in the minds of the average persons among whom it is intended to circulate—that is, the average Time reader (P. 9). *Boyer v. Pitt Publishing Company*, 324 Pa. 154, 157, 188 A. 203, 204 (1936).

This is precisely what the Court of Appeals did, with painstaking care. The Court analyzed each of the sections of the article petitioners complained about and the libelous meanings ascribed to the words by the innuendos. It correctly pointed out that, under Pennsylvania law, innuendos may be used to define and explain the defamatory meaning attributed to words, but that they cannot be used to introduce new matter, to enlarge the natural meaning of the words, or to put an unfair and forced construction on the article. *McAndrew v. Scranton Repub. Pub. Co.*, 364 Pa. 504, 512, 72 A. 2d 780, 783 (1950); *Bagash v. Elkins*, *supra*, 405 Pa. at 440, 176 A. 2d at 679 (1962).

The Third Circuit, correctly applying the above principles of Pennsylvania law, held that the statements in the article that Sellers "plays golf for business rather than pleasure" and that his "game was running true to form"—which were limited to one activity, golf—could not fairly and reasonably be construed to have the meaning imputed to them by petitioners, namely, that they portrayed Sellers

3. References to the Petition for a Writ of Certiorari are cited herein as "P.".

as an overly materialistic or crass man for whom business success overrides all concern for others. The Court also held that the statement in the article that "'. . . his mind on a potential deal, Sellers hit the ball so awkwardly that it flew to the rear and struck one of his partners, James Walsh . . . .'", fairly read, states that Sellers hit an awkward shot because he had his mind on a potential deal; that to so state was not defamatory because not to concentrate properly in golf, to hit a ball awkwardly in golf, and to play golf for business are commonplace events; and that the tragic result of these commonplace events (the blinding of Walsh's left eye) did not impart a defamatory meaning to the article because the average Time reader would recognize that Sellers, the author of the "impossible" shot, could not have foreseen its occurrence or consequences.

The Third Circuit's decision is manifestly right, and clearly in accord with Pennsylvania case law. Compare *Clark v. Allen*, *supra*, a 1964 Pennsylvania Supreme Court decision holding an accusation that a United States senator's voting record exhibited "communist tendencies" was not libelous as a matter of law; and *Kernick v. Dardanell Press*, *supra*, a 1967 decision of the same court holding an accusation that a township auditor repeatedly brought "outrageous" and "baseless" charges "carefully calculated to disparage the township and its officials" which cost the taxpayers money to investigate was not libelous as a matter of law.

The principles followed in *Sarkees v. Warner-West Corp.*, *supra*, for determining capacity for defamatory meaning, which the Third Circuit relied on here, are the law of Pennsylvania today. The three cases discussed at some length in the petition as supporting petitioners' position that the Time article "was at least capable of a defamatory meaning" (P. 19) and as being in conflict with

Sarkees, correctly apply these same principles on the issue of capacity for defamatory meaning and do not support petitioners' position: *Friday v. Official Detective Stores, Inc.*, 233 F. Supp. 1021 (E. D. Pa. 1964); *Birl v. Philadelphia Electric Company*, 402 Pa. 297, 167 A. 2d 472 (1960); *Boyer v. Pitt Publishing Company, supra*.[4] In *Friday* and *Boyer*, the articles were clearly capable of imputing criminal conduct or involvement on the part of the plaintiffs; in *Birl* the slanderous statement was held capable of imputing that the plaintiff lacked honor and integrity, and was not a person to be relied on, insofar as his business dealings were concerned, because it categorically stated that his former employer would have no further dealings with the plaintiff.

Petitioners misread and misquote the Third Circuit's opinion when they claim that the Court applied a test of what the average Time reader would "probably" conclude upon a reading of the article (P. 11). No such test was stated or applied, as a reading of the opinion will demonstrate.

The issue of whether an article is capable of a defamatory meaning is not a fact issue under Pennsylvania law or under the general common law of libel. Nor does its resolution turn on a test which would find capacity for defamatory meaning unless "construing the facts in the light most favorable to plaintiff's position, reasonable men could not differ on the non-defamatory nature of the communication," as petitioners contend (P. 11). On the contrary, the test to be applied by the Court is "the effect the article is fairly calculated to produce, the impression it

4. The petition, at p. 18, quotes only the second of the two newspaper articles involved in *Boyer*. The omitted first article is the one principally relied on by the Pennsylvania Supreme Court as being reasonably capable of imputing perjury on the part of the plaintiff.

would naturally engender, in the minds of the average persons among whom it is intended to circulate." *Rogers v. Evil Publishing Company, supra.*

Petitioners' claim that their Seventh Amendment right of trial by jury has been violated by the Third Circuit's decision is thus wholly misconceived. The Seventh Amendment right to trial of civil actions by jury has never been absolute, as this Court has held from the beginning. See, *e.g., Capital Traction Co. v. Hof*, 174 U. S. 1, 19 (1898). Obviously the granting of motions to dismiss for failure to state a claim, for judgment on the pleadings and for summary judgment, in appropriate cases as here, are not in conflict with the right. All of the decisions of this Court cited in the petition in support of petitioners' claim that they have been deprived of their right to a jury trial involve rulings by lower courts that the evidence was insufficient for submission to a jury, where the court undertook to resolve testimonial conflicts, credibility issues and other questions of fact.

(2). The Third Circuit Properly Affirmed on a Common Law Ground.

As the Court of Appeals points out in its opinion, it is clear from Judge Kraft's opinion the District Court ruled that the Time article was not reasonably capable of a defamatory meaning. Nonetheless, petitioners' persist in their contention that the Third Circuit misconstrued the District Court's opinion and thus "evaded the vital issues of common law and constitutional privilege which formed the basis for the District Court's holding" (P. 9-10). But even assuming petitioners are right, and the Third Circuit and respondent wrong, it is clear that the Court of Appeals properly considered and decided the issue of the article's capacity for defamatory meaning without reaching the

privilege issues. Two principles are involved: First, as this Court has held, where two issues are raised, one of non-constitutional nature and the other of constitutional nature, and a decision of the non constitutional issue would make unnecessary a decision of the constitutional issue, a court of appeals should decide the former. *Alma Motor Co. v. Timken Detroit Axle Co.*, 329 U. S. 129, 136 (1946); *Rosenberg v. Fleuti*, 374 U. S. 449 (1963). Second, a Court of Appeals has the power to affirm a District Court if the result is correct even though its affirmance is based on grounds not considered or relied on below, and even though the District Court's decision was based on incorrect reasoning. *Helvering v. Gowran*, 302 U. S. 238, 245 (1937); *Viler Manufacturing Co. v. Government of Virgin Islands*, 351 F. 2d 313, 317 (3d Cir. 1965). Plainly, then, the Third Circuit had the power and duty to affirm on the ground that the article was not reasonably capable of a defamatory meaning as a matter of law, if even the District Court had not so held or had applied the wrong test in so holding.

(3) Petitioners' Alternative Invasion of Privacy Theory of Recovery.

Petitioner Sellers asks this Court to review on certiorari the alleged error of the Court of Appeals in failing to remand the action to the District Court on the issue of invasion of privacy, claiming that the District Court in turn erred in not holding that Sellers was entitled to have the privacy issue passed upon by a jury. As already pointed out, this alternative privacy theory of recovery was raised for the first time in the petition for rehearing by the Third Circuit, based upon an oblique reference to it in petitioners' reply brief, asserting that the Court of Appeals had "completely overlooked and failed even to discuss" Sellers' footnote reference to the fact that "his cause of

action may also be sustained under the Pennsylvania common law principle of invasion of privacy" (Pet. for Rehearing, p. 9). Petitioners' complaint sounds solely in libel. At no time did Sellers claim or suggest in the District Court, directly or indirectly, that his right of privacy had been invaded by publication of the Time article.

The Third Circuit follows the consistent practice of refusing to consider issues, theories, and questions not raised below when reviewing decisions of District Courts. *Shafer v. Reo Motors, Inc.*, 205 F. 2d 685 (3d Cir. 1953); *In Re Linda Coal and Supply Co.*, 255 F. 2d 653 (3d Cir. 1958). This Court has approved the Third Circuit's practice, stating that a Court of Appeals should not review or consider issues not raised below except in exceptional circumstances where a failure to do so would lead to a "plain miscarriage of justice." *Hormel v. Helvering*, 312 U. S. 552 (1941). And this Court itself, in *Virginian Railway Company v. Mullens*, 271 U. S. 220, 227 (1926), following grant of certiorari, refused to consider on review a new theory of liability not raised below by the plaintiff-appellee.

There are no special circumstances warranting review by this Court of petitioners' new theory of recovery. In effect, petitioners are asking this Court to review and correct a mistake made by their counsel; not a mistake made by the Court of Appeals or by the District Court. The new issue involves the question of whether Sellers has a cause of action, under the common law of Pennsylvania, for invasion of privacy based on the publication of Time's report of a judicial decision of public interest, in litigation in which Sellers was a party. It is a matter of state law, and its resolution is important to no one except the parties to this action.

Moreover Sellers' eleventh hour claim that his present action can be sustained under a common law privacy theory

is without substantive merit, in view of the decision of the District Court. The Pennsylvania cases dealing with the right of privacy establish that press reports of court proceedings, including routine divorce actions, are privileged. Those involved in a court proceeding, however unwillingly and whether as parties or witnesses or because of their relationship to parties or witnesses, become objects of public interest; and the press is privileged to report the event and their connection with it. *Acquino v. Bulletin Company*, 190 Pa. Super. 528, 534-36, 154 A. 2d 422, 426-27 (1959). The privilege may be lost, where, as in *Acquino*, the article dealing with the spite marriage and divorce of the daughter of the plaintiffs was in the nature of fiction and not a news report, the facts were embellished, sensationalized and fictionalized, and the story bedecked with a large drawing bearing no resemblance to the divorced couple. In *Acquino*, the Superior Court quite properly held that the lower court correctly left it to the jury to determine whether the purpose of the article was not the reporting of news but to amuse and astonish the reading public and whether the publisher should have realized the article would be offensive to persons of ordinary sensibilities, thereby constituting an unwarranted invasion of the privacy of the parent plaintiffs.

The District Court, in its opinion in this action, held that the Time article was privileged as a fair report of judicial proceedings. That holding was based on a record which included the court decision reported on and the depositions of the parties to the action. In so holding, the District Court necessarily found that Time's report was a substantially accurate summary of the proceeding, containing no significant omissions and no exaggerated additions or embellishments. Under Pennsylvania law the fair report privilege is not lost by the inclusion in the report of comment fairly based on the contents of the record in

the proceeding. *Sciandra v. Lynett*, 409 Pa. 595, 187 A. 2d 586 (1963); *Cresson v. North American Co.*, 280 Pa. 373, 124 A. 495 (1924). Consistent with that finding, the District Court held that the privilege was not lost by the use of a lively prose style and "color" to enliven an otherwise routine and dull account of a legal decision. 299 F. Supp. at 585. District Judge Kraft also found that the alleged defamatory portions of the article were substantially accurate, that the comment on the undisclosed state of Sellers' mind was fair, and that the language complained of "could only offend a person of the most highly developed sensibilities". 299 F. Supp. at 586.

It follows, therefore, that had petitioners asserted in the District Court a claim that Time's report of Judge Luongo's decision in *Walsh v. Sellers* constituted an actionable invasion of Sellers right of privacy, Judge Kraft would have held it privileged as a matter of law for purposes of the privacy cause also. Judge Kraft's opinion wholly precludes even the possibility of a ruling by him that Time's report was a substantially fictionalized account of the court proceeding and Sellers' connection with it, and the privilege thereby lost.

Judge Kraft also held that Time's article was constitutionally privileged as a matter of law under *New York Times* principles against claims for defamation. The decision of this Court in *Time, Inc. v. Hill*, 385 U. S. 374 (1967), applying the constitutional privilege in a privacy action to a matter of public interest (an article dealing with the opening of a Broadway play), mandates the same holding as respects petitioners' new privacy cause of action.

In summary, the Court of Appeals has correctly applied the applicable state law in affirming the District Court's holding that the Time article was not reasonably

capable of a defamatory meaning as a matter of law. Its decision is entirely in accord with the large number of Pennsylvania Supreme Court cases dealing with the common law of libel, which have consistently held that the issue of capacity for defamatory meaning is a question of law for the court. Its decision follows to the letter the principles applied by Pennsylvania courts in resolving that issue. Four federal court judges, who are constantly required to pass upon Pennsylvania law questions, are in agreement that the challenged article is not reasonably capable of a defamatory meaning. Under the circumstances there is no reason for this Court to deviate from its announced general policy and leave undisturbed this Court of Appeals' holding on a question of state law.

B. The District Court Decision Is Correct in Holding That the Time Article Was Constitutionally Privileged.

Petitioners ask this Court to review the District Court's application of First Amendment protection under *New York Times* principles to Time's report of a judicial decision of substantial public interest, even though the Court of Appeals affirmed the District Court's judgment for respondent on common law grounds and accordingly did not reach the constitutional privilege issue. Petitioners' primary contention is that the application of First Amendment protection to Time's report by the District Court represents an unwarranted extension of *New York Times* principles, and that the Court of Appeals evaded its duty in not reaching the issue and reversing the District Court. In the final paragraph of their petition, they also challenge the District Court's holding that the record before it demonstrated a complete lack of "actual malice" in the *New York Times* sense on the part of respondent's employees.

Petitioners are wrong in both contentions. The application of First Amendment protection to Time's report by the District Court is entirely consistent with and supported by the decisions of this Court and the decisions of lower federal courts applying the principles of *New York Times*. There therefore is no need for review by this Court of the District Court's holding on constitutional privilege.

(1) The First Amendment Protection Applies to Publications of Matters of Public Interest.

Petitioners' argument is basically that the District Court erred in holding that the Time article was constitutionally privileged under *New York Times Co. v. Sullivan*, 376 U. S. 254 (1964) and related cases,[5] because they do not extend such protection beyond statements concerning "public officials" and "public figures" to matters of public interest.

Petitioners are plainly wrong, as should now be apparent. The basis of *New York Times* was that "freedom of expression upon public questions is secured by the First Amendment.'" 376 U. S. at 269. This Court has specifically applied the constitutional privilege in libel actions to public officials [*New York Times*]; public figures, both nationally known [*Butts*] and local [*Greenbelt*]; and, in a false light privacy action, to a matter of public interest (the opening of a Broadway play) [*Hill*]. In its decisions since *New*

5. Those cases include *Garrison v. Louisiana*, 379 U. S. 64 (1964); *Henry v. Collins*, 380 U. S. 356 (1965); *Linn v. United Plant Guard Workers*, 383 U. S. 53 (1966); *Rosenblatt v. Baer*, 383 U. S. 75 (1966); *Time, Inc. v. Hill*, 385 U. S. 374 (1967); *Curtis Publishing Co. v. Butts*, 388 U. S. 130 (1967); *Beckley Newspapers Corp. v. Hanks*, 389 U. S. 81 (1967); *St. Amant v. Thompson*, 390 U. S. 727 (1968); *Pickering v. Board of Education*, 391 U. S. 563 (1968); *Greenbelt Cooperative Publishing Association, Inc. v. Bresler*, 90 S. Ct. 1537 (1970).

York Times this court has continued to emphasize that freedom of expression upon public questions is secured by the First Amendment.[6] It is clear, therefore, that the foundation of the privilege first set forth in *New York Times* is the public's right to be informed concerning matters of public interest.

The courts of appeals have so understood, and have applied the privilege to matters of public interest in *United Medical Laboratories, Inc. v. Columbia Broadcasting System, Inc.*, 404 F. 2d 706 (9th Cir. 1968), *cert. denied*, 394 U. S. 921 (1969) (television broadcast dealing with mail order medical laboratories); *Time, Inc. v. McLaney*, 406 F. 2d 565 (5th Cir.), *cert. denied*, 395 U. S. 922 (1969) (article dealing with election campaign in Bahamas); *Rosenbloom v. Metromedia, Inc.*, 415 F. 2d 892 (1969), *cert. granted*, 397 U. S. 904 (1970); (radio broadcasts dealing with police arrests of dealers and distributors of allegedly obscene magazines); *Wasserman v. Times, Inc.*, 424 F. 2d 920 (D. C. Cir. 1970) (article dealing with police arrests of top Mafia leaders in a public restaurant); *Bon Air Hotel, Inc. v. Time, Inc.*, — F. 2d — (5th Cir. 1970) [No. 27,490, May 6, 1970] (article dealing with upcoming Masters' Golf Tournament and public accommodations available for spectators).[7] So also have a number of federal district courts [e.g., *Grove v. Dun & Bradstreet, Inc.*, 308 F. Supp. 1068 (W. D. Pa. 1970) (mercantile credit report)], and state courts [e.g., *Grayson v. Curtis Publishing Co.*, 72 Wash. 999, 436 P. 2d 756 (1967) (article dealing with unsportsmanlike conduct of basketball coaches, players and officials)].

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6. *Garrison*, 379 U. S. at 74-75; *Rosenblatt*, 383 U. S. at 75, 86; *Pickering*, 391 U. S. at 573-74; *Butts*, 388 U. S. at 147; *Hill*, 385 U. S. at 387-88.

7. The opinion of the Court of Appeals for the Fifth Circuit in *Bon Air Hotel, Inc. v. Time, Inc.*, which is not yet reported, is attached hereto as Appendix A.

The decision of Judge Luongo in *Walsh v. Sellers*, on which Time reported, was prominently featured in Section 1 of the April 19, 1966 issue of United States Law Week under the bold face heading "Golfer Does Not Assume Risk Of Injury by 'Impossible' Shot". The opening sentences of Law Week's comment read: "Let the duffer beware. His playing partners do not assume the risk of his negligence and ineptitude, according to the U. S. District Court for Eastern Pennsylvania." Key portions of Judge Luongo's opinion were reprinted in Section 2 of that issue, under the general heading "Significant Opinions Not Yet Generally Reported".

Judge Luongo's decision involved a ruling of particular public interest, not only to the legal profession but to laymen as well. Millions of Americans who participate in sports doubtless believe that they cannot recover for any injuries they may sustain during those activities or that they cannot be held liable for injuries which they themselves inflict. *Walsh v. Sellers* presented an unusual factual situation of almost textbook ingenuity in which the extent of the "assumption of risk" doctrine for golfers (and by analogy, other sports) could be clarified. Judge Luongo's opinion severely limited that doctrine, holding that a person assumes the risk of being hit by a golf ball only when he is standing in the "apparent orbit" of the shot. In short, the decision undoubtedly was of more immediate interest to the American public than the latest ruling of this Court concerning patent issues or antitrust law.

Time's report stuck to the point. It did not deal with Sellers' personal life as petitioners suggest, or otherwise report extraneous information. The information in the article came from the record on which Judge Luongo based his decision, which included the depositions of the parties. The statement that Sellers played golf for business reasons

was the explanation for the otherwise curious fact that the action was brought not only against him personally but also against his company.

The decision in *Walsh v. Sellers* was obviously a matter of legitimate public interest. District Judge Kraft correctly interpreted and applied the principles of *New York Times* in holding that the judicial decision, which he found involved "two outstanding points of reader interest . . . the unusual flight of the ball and the legal decision that the defense of assumption of risk was inapplicable under the particular facts," was "a matter of public interest" and that therefore Time's report was constitutionally privileged. 299 F. Supp. at 586.

(2) Respondent Is Entitled to Summary Judgment.

The record upon which the District Court based its grant of summary judgment for respondent was a complete one. In addition to Judge Luongo's opinion in *Walsh v. Sellers* and the depositions of Walsh and Sellers in that case, on which Time's report was based, the record included the following: (1) Respondent's answers to two sets of interrogatories, setting forth in detail the editorial process relating to the article; (2) Time's editorial reference file relating to the article; (3) The depositions of the five individuals who participated in the preparation of the article and who were examined at length by petitioners' counsel—Time's Philadelphia correspondent, Time's Managing Editor, the writer of the article, its editor, and the researcher who checked it for accuracy; and (4) The supporting affidavits of the article's writer, editor and researcher, all of whom verified their belief in the truth of the article when it was published. Petitioners submitted no opposing affidavits.

As the District Court's opinion indicates, Judge Kraft applied the correct standard in examining the complete record to determine whether petitioners could prove "actual malice" as defined in *New York Times*. He pointed out that petitioners, to overcome the constitutional privilege, "must prove with 'convincing clarity' that the statement was false and that it was made with knowledge of its falsity or in reckless disregard of whether it was false or true", citing *New York Times*. 299 F. Supp. at 584, n. 2. Based on that examination, and applying the correct standard, Judge Kraft concluded that the documents comprising the record ". . . manifestly demonstrate the complete lack of any knowledge of the falsity of the article or reckless disregard of the truth on the part of Time's employees. The plaintiff has submitted no affidavits to the contrary, and, so, has failed to offer evidence of the existence of any genuine issue of actual malice." 299 F. Supp. at 586. Judge Kraft also found that the portions of the article claimed by petitioners to be defamatory ". . . are substantially accurate." 299 F. Supp. at 586.

Since the procedure followed by the District Court in assessing the evidence was clearly in accord with the constitutional standard laid down by this Court in *New York Times*, and repeated and amplified in *Garrison* and *St. Amant*, there is no need for this Court to review the District Court's finding that there was constitutionally insufficient evidence to take petitioners to a jury on the issue of actual malice.

This Court has pointed out in *New York Times*, 376 U. S. at 279, and in *Hill*, 385 U. S. at 389, that fear of the expense of trial is as great a threat to free discussion of matters of public interest as fear of large libel verdicts. Thus, free exercise of First Amendment rights requires that summary judgment be granted as soon as it becomes

clear that a plaintiff cannot establish "actual malice". Summary judgment was granted for the defendant publisher, in applying the constitutional principles of *New York Times*, in *Washington Post Co. v. Keogh*, 365 F. 2d 965, 968 (D. C. Cir. 1966), *cert. denied*, 385 U. S. 1011 (1967), *Time, Inc. v. McLaney*, *supra*, and *Bon Air Hotel, Inc. v. Time, Inc.*, *supra*, among numerous other First Amendment cases in federal and state courts. Summary disposition was appropriate here.

C. The District Court Decision Is Correct in Holding That the Time Article Was Privileged as a Fair Report of Judicial Proceedings.

Petitioners ask this Court to review on certiorari another question of state law—the holding of the District Court that Time's article was privileged as a fair report of judicial proceedings under the common law of libel. Again the holding of the District Court is in accord with Pennsylvania state court libel cases, involves nothing new or novel, and is of importance to no one except the party litigants.

Numerous Pennsylvania decisions establish that a report on the contents of public records, including those of judicial proceedings, is qualifiedly privileged against a libel claim. *Sciandara v. Lynett*, 409 Pa. 595, 187 A. 2d 586 (1963); *Boyer v. Pitt Publishing Company*, 324 Pa. 154, 188 A. 203 (1936). It is clear that such records as judicial opinions and deposition transcripts are within the coverage of the privilege. *Mengel v. Reading Eagle Co.*, 241 Pa. 367, 88 A. 660 (1913); *Wachs v. Ramp Consulting Services, Inc.*, 28 D. & C. 2d 201 (C. P. Montg. Co. 1961). The privilege is a bar to the libel claim unless the plaintiff establishes that the report is not a substantially accurate summary, as by a showing of significant omissions or of exaggerated

additions and embellishments; or that the report was published solely for the purpose of causing him harm. *Sciandra v. Lynett, supra*, 409 Pa. at 600-601, 187 A. 2d at 589.

The privilege allows the press reasonable freedom in reporting on judicial proceedings. It permits the use of a lively prose style and "color" to enliven an otherwise routine and dull account of a legal decision, as the District Court held. Comment fairly based on the contents of the record is permitted. *Sciandra v. Lynett, supra, Cresson v. North American Co.*, 280 Pa. 373, 124 A. 495 (1924). In *Sciandra*, for example, the Pennsylvania Supreme Court held that a series of newspaper articles concerning an official New York State report on a meeting at Appalachin, N. Y., widely suspected of being a business meeting of underworld overlords and their vassals, was privileged as a matter of law even though the series used language not contained in the official report, such as a headline reading "Barbecue Gives Four A Bellyache" and such phrases as "gangland convention," "infamous gangland meeting" and "so-called hoodlum meeting." The court said the plaintiff's complaint about such language was without merit or justification in view of the information contained in the report concerning the police records of his traveling companions.

Petitioners challenge the holding of the District Court that the article was privileged as a fair report of a judicial proceeding on the ground Time's report "is not accurate or complete, or at least a fair abridgment of the proceedings" (P. 28), and apparently on the ground the statements in the article claimed to be libelous constitute unfair comment. But Judge Kraft, with the record in *Walsh v. Sellers* (including Judge Luongo's opinion and Sellers' deposition) before him, held that the statements complained of were substantially accurate and fair based on that record.

Moreover Judge Kraft held that "The Time article, read as a whole, fairly reports the result of Judge Luongo's decision." 299 F. Supp. at 585.

The District Court's holding on the Pennsylvania common law privilege issue was clearly correct and in accord with Pennsylvania case law. Review by this Court of the District Court's holding on a question of state law plainly is not warranted.

CONCLUSION.

The petition does not present any questions warranting review by this Court and should be denied.

Respectfully submitted,

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August 21, 1970.

APPENDIX A.

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 27490

BON AIR HOTEL, INC.,
Plaintiff-Appellant,

versus

TIME, INC. and DAN JENKINS,
Defendants-Appellees.

Appeal from the United States District Court for the Southern District of Georgia

(May 6, 1970)

Before RIVES, COLEMAN and MORGAN, *Circuit Judges.*

RIVES, Circuit Judge: Bon Air appeals from the district court's order granting Time, Inc. and Dan Jenkins' (hereinafter referred to as Time) motion for summary judgement. *Bon Air Hotel, Inc. v. Time, Inc.*, 295 F. Supp. 704 (S. D. Ga. 1969).

Appellant, owner of the Bon Air Hotel in Augusta, Georgia, brought this libel action against Time for an article written by Jenkins and published in its magazine Sports Illustrated. Time's initial motion for summary judgment was denied by Judge Scarlett on December 20, 1967. On March 4, 1968, this Court denied Time's application for leave to appeal under 28 U. S. C. A. § 1292(b). Subsequently, the Supreme Court denied certiorari. 383 U. S. 859. Meanwhile Judge Scarlett had retired. Further proceedings were held before his successor, Judge Lawrence. On January 30, 1969, Judge Lawrence, pursuant to Rule 60(b), Fed. R. Civ. P., vacated Judge Scarlett's order and granted Time's motion for summary judgment.

Bon Air contends that the district court's order should be reversed on the grounds that: (1) The district court erred in applying the *New York Times*[1] rule to the publication in question; (2) the district court denied Bon Air due process of law in granting the motion for summary judgment without notice or opportunity for hearing; and (3) the district court erred in granting summary judgment.

The facts surrounding the publication will be mentioned only briefly since the district court's opinion sets forth the facts in detail. The April 6, 1964 issue of Sports Illustrated was devoted in large part to the Masters' Golf Tournament which is held each April in Augusta, Georgia. This issue included an article written by Jenkins, a well-known sports writer, who had visited Augusta during the week of the Tournament for fourteen years. The article described conditions under which the Tournament was held, accommodations available in Augusta for both players and spectators, and, in particular, conditions at the Bon Air Hotel. Examining the present condition of the hotel and past experiences of its guests during the week of the Tournament, Jenkins focused on the

1. New York Times Co. v. Sullivan, 376 U. S. 254 (1964).

"decline into dishevelment of the Bon Air Hotel though the general theme was Augusta and the Masters Tournament. According to the author, 100,000 golf enthusiasts visit that city each year when it is played. Millions watch the event on television. For over twenty years prior to 1960 the Bon Air had been a landmark of the Masters scene. It was part and parcel of the Tournament. As the article says, 'The Bon Air was the place to be, and to be seen.' During the period 1961-1964 the hotel was closed for fifty-one weeks for each year and was opened only for the week of the Masters. The author had stayed at or visited the Bon Air for thirteen years and had observed first hand its alleged decline from the status of *grande dame* into the station of a dowdy, decrepit and disheveled old woman."

295 F. Supp. at 707.

I. *New York Times Issue.*

The district court held the case was a proper one for application of the actual malice standard of *New York Times Co. v. Sullivan*, 376 U. S. 254 (1964). Bon Air contends this holding is erroneous in that (1) the *New York Times* rule applies only to defamation of "public officials" and "public figures" and (2) assuming that *New York Times* is applicable, the subject matter of the publication in question is not of sufficient public interest to warrant first amendment immunity. We conclude that both contentions are without merit.

In *New York Times* the Supreme Court held that the first amendment limits a state's power to award damages in a libel action brought by a public official against critics of his official conduct. The rationale of the decision was that in the area of free debate, where exaggeration and misstatement are inevitable, freedom of expression must

have the breathing space it needs to survive regardless of "the truth, popularity, or social utility" of the statements. 376 U. S. at 271. However, the Court conditioned the first amendment protection on a lack of actual malice, *i.e.*, knowledge that a statement is false or reckless disregard of whether or not it is false. In *Curtis Publishing Co. v. Butts*, 388 U. S. 130 (1967), the Court extended the first amendment guarantees to misstatement of fact in discussing public figures.

The question before us is whether the first amendment protection, extended to public officials in *New York Times* and to public figures in *Butts*, applies to publication concerning matters of public interest. In decisions since *New York Times*, the Court has continued to emphasize that freedom of expression upon public questions is secured by the first amendment.[2] This Court in *Time, Inc. v. McLaney*, 406 F. 2d 565 (5 Cir.), *cert. den.*, 395 U. S. 922 (1969), noted that the *New York Times* actual malice standard is applicable to publications involving matters of great public interest.[3]

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2. *See* Garrison v. Louisiana, 379 U. S. 64, 74-75 (1964); Rosenblatt v. Baer, 383 U. S. 75, 86 (1966); Curtis Publishing Co. v. Butts, *supra* at 150-52; Pickering v. Board of Education, 391 U. S. 563, 573-74 (1968). In *Butts*, Justice Harlan (announcing the judgment of the Court) relied on a phrase from Thornhill v. Alabama, 310 U. S. 88, 102 (1940), that freedom of discussion "'must embrace all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period.'" 388 U. S. at 147. In Time, Inc. v. Hill, 385 U. S. 374 (1967), the Court denied recovery in an action brought under New York's right of privacy statute. Relying on *New York Times*, the Court held that "the constitutional protections for speech and press preclude the application of the New York statute to redress false reports of matters of public interest in the absence of proof that the defendant published the report with knowledge of its falsity or in reckless disregard of the truth." *Id.* at 387-88.

3. The Court in *McLaney* predicated its application of the *New York Times* standard on McLaney's active participation in matters of important public concern. McLaney, Like General Walker in

Since the *Butts* decision, which extended first amendment protection to public figures, numerous lower courts have extended application of the actual malice standard to publications possessing a valid public interest.[4] We agree with these decisions that publications concerning matters of public interest are protected by the first amendment absent proof of actual malice.

Bon Air also contends that, if the *New York Times* actual malice standard applies to publications discussing matters of public interest, the article in Sports Illustrated is not of sufficient public interest to warrant first amendment immunity. In particular, Bon Air argues that the Masters' Golf Tournament does not make an inconspicuous and little-known hotel a matter of such public interest.

In rejecting this contention, the district court found that the national interest in the particular event and the

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3. (cont'd)
Curtis Publishing Co. v. Butts, *supra*, had thrust his personality into the "vortex" of an important public controversy. The Court, however, did not attempt to limit *New York Times* to public officials and public figures, but agreed with the Ninth Circuit's decision in United Medical Laboratories, Inc. v. Columbia Broadcasting System, Inc., 404 F. 2d 706 (9 Cir. 1968), which applied the actual malice standard to matters of legitimate public interest.

4. Wasserman v. Time, Inc., — F. 2d — (D. C. Cir. 1970) [No. 23,267, Mar. 3, 1970]; Rosenbloom v. Metromedia, Inc., 415 F. 2d 892 (3 Cir. 1969); United Medical Laboratories, Inc. v. Columbia Broadcasting System, Inc., 404 F. 2d 706 (9 Cir. 1968); Holmes v. Curtis Publishing Co., 303 F. Supp. 522 (D. S. C. 1969); Cerrito v. Time, Inc., 302 F. Supp. 1071 (N. D. Cal. 1969); Ragano v. Time, Inc., 302 F. Supp. 1005 (M. D. Fla. 1969); Arizona Biochemical Co. v. Hearst, 302 F. Supp. 412 (S. D. N. Y. 1969); DeSalvo v. 20th Century-Fox Corp., 300 F. Supp. 742 (D. Mass. 1969); Sellers v. Time, Inc., 299 F. Supp. 582 (E. D. Pa. 1969); Altoona Clay Prods., Inc. v. Dun & Bradstreet, Inc., 286 F. Supp. 809 (W. D. Pa. 1968); Cullen v. Grove Press, Inc., 276 F. Supp. 727 (S. D. N. Y. 1967); All Diet Food Distributors, Inc. v. Time, Inc., 290 N. Y. S. 2d 445 (Sup. Ct. 1967); *see* Time, Inc. v. McLaney, 406 F. 2d 565 (5 Cir. 1969). *See also* Curtis Publishing Co. v. Butts, 351 F. 2d 702, 721-22 (5 Cir. 1965) (Rives, J., dissenting).

interest of 100,000 golf enthusiasts in the accommodations in Augusta during the Masters' Tournament constituted a valid public interest. We agree. Although some "public interest" cases have dealt with matters of a more critical nature, *e.g.*, public health[5] and organized crime,[6] we conclude that Time's article, focusing on Augusta, the Masters' Golf Tournament and the public accommodations available for the many thousands of spectators, was of a legitimate public interest.[7] For these reasons, the district court did not err in applying the *New York Times* actual malice standard to the publication in question.

II. *Denial of Due Process.*

Bon Air next contends that it was denied due process of law when the district court granted Time's motion for summary judgment without notice or opportunity to develop a case by oral argument or by presentation of evidence.

The district court on January 20, 1969, wrote counsel and inquired whether the court had the power, and if so whether it should be exercised under the circumstances, to vacate the court's previous denial of Time's motion for summary judgment. Counsel for Time replied that the court did have the power to vacate and suggested that his letter be treated as a motion for reconsideration of Time's earlier motion for summary judgment. On January 23 the court notified counsel that it was treating the letter as a

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5. United Medical Laboratories, Inc. v. Columbia Broadcasting System, Inc., *supra*.

6. Wasserman v. Time, Inc., *supra*; Cerrito v. Time, Inc., *supra*; Ragano v. Time, Inc., *supra*; Time, Inc. v. McLaney, *supra*.

7. *See* Rosenbloom v. Metromedia, Inc., *supra* (obscence literature); Sellers v. Time, Inc., *supra* (freak accident on golf course and resulting action for damages); Altoona Clay Prods., Inc. v. Dun & Bradstreet, Inc., *supra* (credit information).

motion to vacate the earlier order denying summary judgment and also as a motion to reopen Time's earlier motion for summary judgment. Counsel for Bon Air, in replying to the court on January 27, 1969, conceded that the court had the power to vacate the earlier order denying summary judgment but urged the court not to exercise that power. On January 30, 1969,[8] the court granted Time's motion for summary judgment.

The district court's denial of Time's motion for summary judgment on December 20, 1967, was only an interlocutory order and thus not subject to being vacated under Rule 60(b), Fed. R. Civ. P.[9] However, because the order was interlocutory, "the court at any time before final decree [could] modify or rescind it." *John Simmons Co. v. Grier Brothers Co.*, 258 U. S. 82, 88 (1922); see *Carter v. American Bus Lines, Inc.*, 22 F. R. D. 323, 325 (D. Neb. 1958); *Kliaguine v. Jerome, supra.* Thus, vacating the earlier order was within the district court's power, and we do not find that the court abused its discretion. *See Marconi Wireless Telegraph Co. v. United States*, 320 U. S. 1, 47-48 (1943).

Rule 56(c), Fed. R. Civ. P., provides that the "motion [for summary judgment] shall be served at least 10 days before the time fixed for the hearing." This Court has interpreted Rule 56(c) as requiring notice to the adverse party and a hearing.[10]

We are of the opinion that both of these requirements were complied with in the district court. Through the dis-

8. Although the order is dated January 29, 1969, it was filed with the clerk on January 30.

9. Kliaguine v. Jerome, 91 F. Supp. 809, 810 (E. D. N. Y. 1950); *see* 6 Moore Federal Practice §§ 56.14[2], 60.20 (2d ed. 1966).

10. Georgia Southern & Fla. Ry. Co. v. Atlantic Coast Line R. R. Co., 373 F. 2d 493, 496-97 (5 Cir. 1967); Enochs v. Sisson, 301 F. 2d 125, 126 (5 Cir. 1962). See also Bowdidge v. Lehman, 252 F. 2d 366 (6 Cir. 1958).

trict judge's letter to counsel on January 20, 1969, and the court's notification on January 23, 1969, Bon Air received sufficient notice that the district court was reconsidering Time's motion for summary judgment.

The following factors are relevant in our consideration of the question of whether Bon Air was allowed to be heard on the summary judgment motion: (1) Oral argument was conducted on Time's original motion for summary judgment, which was denied; (2) Bon Air filed briefs in opposition to Time's petition in this Court for leave to appeal the denial of its motion and also in opposition to Time's petition for rehearing of this Court's denial of the above petition; (3) affidavits and interrogatories with Time and Dan Jenkins' answers thereto were filed with the district court by Bon Air; (4) on January 27, Bon Air submitted a letter to the district court, together with a pretrial brief, and urged that the district court should not vacate its earlier denial of Time's summary judgment motion, for the principal reason that the case should proceed to trial and should not be disposed of through summary judgment. The combination of these factors convinces us that Bon Air was "heard," within the meaning of Rule 56(e), on the reconsideration of Time's motion for summary judgment. The fact that an oral hearing was not held on the court's reconsideration of Time's motion does not amount to noncompliance with Rule 56(e) or a denial of due process.[11]

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11. *See* Hilton v. W. T. Grant & Co., 212 F. Supp. 126, 128-29 (W. D. Pa. 1962). *See also* Federal Communication Comm'n v. WJR, the Goodwill Station, Inc., 337 U. S. 265, 274-77 (1949). Another consideration is Bon Air's inaction. Because this was a reconsideration of Time's earlier motion for summary judgment, it seems to us that Bon Air should have presented any additional evidence through affidavits or otherwise under Rule 56(e), Fed. R. Civ. P., and if time had not permitted it to do so, should have requested the district court to reconsider its order granting summary judgment. In the absence of some such action on Bon Air's part, we are left to mere speculation as to whether any additional evidence was available to Bon Air.

III. *Summary Judgment.*

Having concluded that *New York Times'* actual malice standard was applicable to the publication in question, the district court examined the record and granted Time's motion for summary judgment. The court held the record "devoid of any showing that defamatory statements were published by defendant Time . . . with knowledge of their falsity or with a reckless disregard of whether they were true or false." 295 F. Supp. at 709. We agree with the district court that the record was totally devoid of facts from which Bon Air could prove that statements were made by Time and Jenkins with actual malice, and proceed to state our views at some length.

The Supreme Court in *New York Times* conditioned the first amendment privilege to make misstatement of facts on the absence of a publisher's actual malice, *i.e.*, with actual knowledge of a statement's falsity or with reckless disregard of its falsity. 376 U. S. at 279-80. In *Garrison v. Louisiana*, *supra* at 74, "reckless disregard" is defined as "high degree of awareness of probable falsity," and in *St. Amant v. Thompson*, 390 U. S. 727, 731 (1968), as "serious doubts as to the truth." [12] In addition, the Court

12. In its most complete statement on the "reckless disregard" element of actual malice, the Court in *St. Amant* explained:

> "'Reckless disregard,' it is true, cannot be fully encompassed in one infallible definition. Inevitably its outer limits will be marked out through case-by-case adjudication, as is true with so many legal standards for judging concrete cases, whether the standard is provided by the Constitution, statutes, or case law. Our cases, however, have furnished meaningful guidance for the further definition of a reckless publication. In *New York Times*, *supra*, the plaintiff did not satisfy his burden because the record failed to show that the publisher was aware of the likelihood that he was circulating false information. In *Garrison v. Louisiana*, 379 U. S. 64 (1964), also decided before the decision of the Louisiana Supreme Court in this case, the opinion emphasized the necessity for a showing that a false publication was made with a 'high degree of awareness of . . . probable falsity.' . . .

placed a heavy burden of proof on plaintiffs—actual malice must be proved with "convincing clarity." [13]

Actual malice is a constitutional issue to be decided initially by the trial judge vis-à-vis motions for summary judgment and directed verdict. The functions of the trial court judge and the jury have been explained as follows:

> "In my judgment *New York Times Co. v. Sullivan* makes actual malice a constitutional issue to be decided in the first instance by the trial judge applying the *Times* test of actual knowledge or reckless disregard of the truth. *Cf. Jackson v. Denno*, 378 U. S. 368 (1964). Unless the court finds, on the basis of pretrial affidavits, depositions or other documentary evidence, that the plaintiff can prove actual malice in the *Times* sense, it should grant summary judgment for the defendant . . . .
>
> "If the case survives the defendant's summary judgment motion, the trial court at the close of the plaintiff's case must decide whether actual malice has been shown with 'convincing clarity.' In making this judgment the court will judge the credibility of the witnesses and draw its own inferences from the evidence. If the trial is permitted to proceed, the court

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12. (cont'd)

These cases are clear that reckless conduct is not measured by whether a reasonably prudent man would have published, or would have investigated before publishing. *There must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication.* Publishing with such doubts shows reckless disregard for truth or falsity and demonstrates actual malice."

390 U. S. at 730-31 [emphasis added].

13. New York Times Co. v. Sullivan, *supra* at 285-86; *see* Cepeda v. Cowles Magazines & Broadcasting, Inc., 392 F. 2d 417 (9 Cir. 1968); Rangano v. Time, Inc., 302 F. Supp. 1005, 1010 (M. D. Fla. 1969).

> will be called upon again to make a judgment on the actual malice issue at the close of all of the evidence. If the motion for a directed verdict at this stage of the trial is denied, the actual malice issue, along with the other issues, is then submitted to the jury under the *Times* instruction without any indication from the court or counsel that the court has decided that the evidence shows actual malice with 'convincing clarity.'" [Citations and footnotes omitted.]

Wasserman v. Time, Inc., — F. 2d — (D. C. Cir. 1970) [No. 23,267, Mar. 3, 1970, slip opinion pp. 4-5] (Wright, J., concurring). Such two-step procedure "provides the protection of the First Amendment freedom that *Times* sought to make secure in areas of public concern" *Id.* at 5. *Compare Rosenblatt v. Baer*, 383 U. S. 75, 88 n. 15 (1966).

Thus it is clear that, where a publication is protected by the *New York Times* immunity rule, summary judgment, rather than trial on the merits, is a proper vehicle for affording constitutional protection in the proper case. Judge Tuttle in *Time, Inc. v. McLaney*, *supra* at 566, recognized the appropriateness of summary judgment:

> "The subject matter of this litigation, involving as it does, the very serious and timely question of how far the First Amendment guarantee of freedom of the press may still be impinged upon by actions for libel, places some cases in a somewhat different category. This follows when the trial court and this court jointly consider that the failure to dismiss a libel suit might necessitate long and expensive trial proceedings, which, if not really warranted, would themselves offend the principles enunciated in *Dombrowski v. Pfister*, 380 U. S. 479, 85 S. Ct. 1116, 14 L. Ed. 2d 22, because of the chilling effect of such litigation."

The District of Columbia Circuit placed a similar emphasis on the role of summary judgments in defamation actions:

> "In the First Amendment area, summary procedures are even more essential. For the stake here, if harassment succeeds, is free debate. . . . Unless persons, including newspapers, desiring to exercise their First Amendment rights are assured freedom from the harassment of lawsuits, they will tend to become self-censors. And to this extent debate on public issues . . . will become less uninhibited, less robust, and less wide-open, for self-censorship affecting the whole public is 'hardly less virulent for being privately administered.' Smith v. People of State of California, 361 U. S. 147, 154, 80 S. Ct. 215, 219, 4 L. ED. 2d 205 (1959)."

Washington Post Co. v. Keogh, 365 F. 2d 965, 968 (D. C. Cir. 1966).

Numerous courts have found summary judgment for publishers proper where the record is devoid of genuine issues of fact as to whether the alleged defamatory statement was published with actual knowledge of its falsity or with a reckless disregard of whether it was true or false.[14] Other courts, however, have not allowed a publisher's motion for summary judgment where facts were presented

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14. Time, Inc. v. McLaney, 406 F. 2d 565 (5 Cir.), *cert. den.*, 395 U. S. 922 (1969); United Medical Laboratories, Inc. v. Columbia Broadcasting System, Inc., 404 F. 2d 706 (9 Cir. 1968), *cert. den.*, 394 U. S. 921 (1969); Hurley v. Northwest Publications, Inc., 398 F. 2d 346 (8 Cir. 1968), *aff'g* 273 F. Supp. 967 (D. Minn. 1967); Walker v. Pulitzer Publishing Co., 394 F. 2d 800 (8 Cir. 1968); Thompson v. Evening Star, 394 F. 2d 774 (D. C. Cir. 1968); Washington Post Co. v. Keogh, 365 F. 2d 965 (D. C. Cir. 1966), *cert. den.*, 385 U. S. 1011 (1967); Cerrito v. Time, Inc., 302 F. Supp. 1071 (N. D. Cal. 1969); Sellers v. Time, Inc., 299 F. Supp. 582 (E. D. Pa. 1969), *aff'd*, — F. 2d — (3 Cir., Mar. 20, 1970).

from which a jury could find that a statement was made with actual malice.[15] We thus proceed to an examination of the record, viewing it and the inferences which might be drawn therefrom in the light most favorable to Bon Air,[16] to ascertain whether "the record established by [Bon Air] demonstrate[s] that there is no issue of fact from which a jury could find 'actual malice.'" *Time, Inc. v. McLaney, supra* at 567; see Rule 56(e), Fed. R. Civ. P.

The complaint alleged that the article as a whole was defamatory and that ten specific statements in the article were false and libeled Bon Air: (1) The hotel has a "white-washed face"; (2) the hotel is staffed with ancient waiters in white coats who "tumble drowsily through the dining room"; (3) the hotel management's attitude toward its guests is that of "stay-at-your-own-risk"; (4) the hotel is being gradually converted into a "residence for the elderly"; (5) halls "sloped awkwardly" toward the rooms; (6) rooms are "wide enough so that by turning sideways a guest can walk between the bed and the dresser"; (7) "Windows are of two types. If, upon entry, a window is up it is not likely ever to come down, especially if the evening is brisk. On the other hand, if the window is down, it will never go up."; (8) tubs and basins were never "worth much"; (9) sleeping accommodations are described: "Sleeping at the Bon Air has long been difficult for reasons other than the heat or the cold or the hardness of the beds.

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15. Wasserman v. Time, Inc., — F. 2d — (D. C. Cir., 1970) [No. 23,267, Mar. 3, 1970]; Goldwater v. Ginzburg, 414 F. 2d 324 (2 Cir. 1969), *aff'g* 261 F. Supp. 784 (S. D. N. Y. 1966); Ragano v. Time, Inc., 302 F. Supp. 1005 (M. D. Fla. 1969), *appeal filed* (5 Cir.); *cf.* Pape v. Time, Inc., 419 F. 2d 980 (7 Cir. 1969), *rev'g* 294 F. Supp. 1087 (N. D. Ill. 1969) (evidence of actual malice sufficient to go to jury); Stearn v. MacLean-Hunter, Ltd., 46 F. R. D. 76 (S. D. N. Y. 1969) (complaint sufficient to state cause of action).

16. United States v. Diebold, Inc., 369 U. S. 654, 655 (1962); Goldwater v. Ginzburg, *supra* at 337; Time, Inc. v. McLaney, *supra* at 571-72.

It is noisy. Not the least amount of noise sometimes is caused by the clacking of highheeled shoes going down the fire escape outside a guest's window at 4 a.m.''; and (10) the hotel has a ''sellout crowd'' for the week of April 6 through April 12, 1964. Bon Air also objected to a drawing of the hotel at the beginning of the article.

Jenkins in writing the article relied on interviews with persons who had stayed at the Bon Air, researched the files of Time, Inc. with respect to Augusta and its background, and drew upon his thirteen years' attendance at the Tournament in Augusta and also upon the occasions when he was a registered guest or visitor at the hotel. After the article was completed and a month before its publication, a Sports Illustrated researcher, Sarah Pileggi, checked the article for accuracy by telephone conversations, by personal interviews, by consuling Time, Inc. files and by reading relevant published sources on golf tournaments and Augusta. Pileggi also sent a list of questions concerning specified statements in the article to Sports Illustrated's Atlanta correspondent, Jim Minter, who with assistance from an Augusta newspaperwoman checked the accuracy of these items. Detailed answers were returned and are included in the affidavits.

The district court examined the article and, in particular, the ten alleged defamatory statements in light of the various affidavits and answers to interrogatories in the record and found ''that no proof was adduced that had 'the convincing clarity which the constitutional standard demands.' ''. This finding is clearly supported by the record. Jenkins relied on his own experiences at the Bon Air in making many of the statements and, in addition, had the article thoroughly investigated for accuracy by members of Time's research staff. The affidavits and answers to interrogatories in the record demonstrate the thoroughness of the research conducted by Time's staff. Bon Air pre-

sented no evidence that Time or Jenkins published the statements with knowledge of their falsity or with "serious doubts as to the truth of [the] publication." *St. Amant v. Thompson*, 390 U. S. 727, 731 (1968); *Time, Inc. v. McLaney*, *supra* at 572-73.

Two alleged defamatory statements merit further discussion: (1) the statement that the hotel had a "whitewashed face" and (2) the sketch of the hotel at the beginning of the article. In investigating the accuracy of the article, Time's researchers gave three different answers: that the hotel was—white-yellowish color, that it was painted outside white, and that it was painted a dazzling white.

At the beginning of the article Time published a sketch of the hotel and surrounding grounds by Marc Simont, who had visited the hotel several times during the preparation of the sketch. Bon Air objected to two areas of the sketch: at the far end of the hotel three wooden braces support the outer hotel wall, and near the swimming pool a small amount of trash covers the ground. The researcher's report stated that during her inspection of the hotel the grounds were clean. In addition, Time admitted that the hotel walls were not supported by wooden braces.

These statements are clearly not 100% accurate. Truth or falsity, however, is not the constitutional test; the statements must be published with actual knowledge of their falsity or with reckless disregard for their falsity. We are not convinced that Time's decision to describe the hotel as having a "whitewashed face," instead of a "white-yellowish face," an "outside white face," or a "dazzling white face," is evidence that the statement was published with actual malice.[17] In publishing the sketch of the hotel,

17. "A word is not a crystal, transparent and unchanged, it is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used." Towne v. Eisner, 1918, 245 U. S. 418, 425.

as explained in its affidavits, Time attempted to convey to its readers, in what amounts to a cartoon, the condition of the hotel as described in the article.[18] Again, the evidence presented by Bon Air is not sufficient proof that the sketch was published by Time with actual malice.[19]

Freedom of expression must have a necessary breathing space if it is to survive.[20] If these statements raise factual issues of actual malice, that necessary breathing space becomes almost meaningless. As has been noted, actual malice is a constitutional issue to be determined initially by the trial judge on motion for summary judgment. We are convinced that Bon Air has not presented issues of fact from which a jury could find that Time published the article with actual knowledge of its falsity or with a reckless disregard as to whether or not it was false.[21]

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18. We would be confronted with an entirely different situation if a true photograph of the hotel had been used with additional pictures of wooden braces and trash superimposed on the photograph.

19. The decisions in Wasserman v. Time, Inc., — F. 2d — (D. C. Cir., Mar. 3, 1970), and Ragano v. Time, Inc., 302 F. Supp. 1005 (M. D. Fla. 1969), are distinguishable. *Wasserman* involved the same factual situation as *Ragano*. Time had published a photograph of seven men sitting in a restaurant in Queens, New York. The article referred to the men as "top Cosa Nostra hoodlums," even though Time *knew* that Wasserman and Ragano were present with the other five men only in an attorney-client relationship. This was sufficient proof of actual malice to survive Time's motion for summary judgment.

20. New York Times Co. v. Sullivan, *supra* at 285-86.

21. The following statement by Judge Tuttle in *McLaney* seems pertinent here:

> "Where . . . it is plain that the record has been fully developed by depositions and affidavits on a motion for summary judgment, and such record demonstrates that, construing all of the facts and inferences to be drawn therefrom in favor of the party against whom the judgment is entered, he would not be entitled to have a jury verdict stand, we have not hesitated to hold that the grant of summary judgment is proper."

406 F. 2d at 571-72.

For these reasons we conclude that the district court did not err in granting Time's motion for summary judgment. The judgment is

AFFIRMED.